THE HONOURABLE SRI JUSTICLE J. CHELAMESWAR
AND
THE HONOURABLE SRI JUSTICE D. APPA RAO

W.P. NO. 19569 of 2006

Dated: -01-2007

Between:-

Smt. Asari Yadamma

…PETITIONER.

And

The Collector and District Magistrate, Karimnagar
and another.

…RESPONDENTS

THE HONOURABLE SRI JUSTICLE J. CHELAMESWAR
AND
THE HONOURABLE SRI JUSTICE D. APPA RAO

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O R D E R (per Hon'ble Sri Justice D. Appa Rao)

The petitioner the wife of detenu sought a Writ of Habeas Corpus for production of detenu Sri Asadi Muthaiah, when he was detained by the 1st respondent District Collector – cum – District Magistrate, Karimnagar by order dated 20.7.2006 under Section 3(2) r/w 3(1) of A.P. Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offender, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 (in short "the Act").

2) The detaining authority while passing order of detention against the detenu, relied on three incidents wherein the detenu was involved in trafficking of illicitly distilled liquor in Sircilla of Karimnagar District.

The first incident was that on 27.10.2005 at 4.45 p.m., when the Station House Officer, Sircilla searched the house of the detenu he found 40 polythene pockets of illicitly distilled liquor. On seeing the police officers along with panchayatdars, the detenu ran away from the place. A case in P.R.No.196/2005-2006 dated 27.10.2005 under Section 7(A) r/w 8(e) of A.P. Prohibition Act, 1995 (for short "the Act, 1995") was registered. When samples were sent to analyst, it was found that the sample was illicitly distilled liquor containing sediment. Later he was arrested and was released on bail. A case in

C.C.No.235 of 2006 is pending before the Judicial Magistrate of First Class, Sircilla.

Again on 5.12.2005 at about 6.30 p.m., when the Prohibition and Excise Inspector, Sircilla raided the house of the detenu, they found 80 polythene covers each containing 500 m.l., of I.D. liquor equivalent to 40 liters. Immediately, the detenu was arrested and samples were drawn. A case in Cr.No.222 of 2005-2006 under Section 7(A) of the Act 1995 was registered. Subsequently, the detenu was released on bail on 8.12.2005. The samples which were drawn were sent to chemical examiner, who on analysis found that it was illicitly distilled liquor containing sediment and fusel oil and it was injurious to health and unfit for human consumption. A case in C.C.No.236 of 2006 is pending in this regard.

Again on 22.3.2006 at about 7.30 p.m., the Prohibition and Excise Inspector, Sircilla raided the house of the detenu. He found 30 polythene pockets of illicitly distilled liquor. The detenu was arrested and samples were drawn from the seized liquor. A case in Crime No.290 of 2005-2006 under Section 7(A) of the Act, 1995 was registered. When the detenu was produced before the Judicial Magistrate of First Class, Sircilla, he was sent to remand, subsequently, he was enlarged on bail. The samples were brought and were sent to chemical analyst, Warangal who in turn analyzed and certified that it was illicitly distilled liquor containing sediment and it is injurious to health and unfit for human consumption. A case in C.C.No.338 of 2006 is pending. The detaining authority having considered the above cases found that in spite of booking number of cases, the detenu was carrying on the activity unhindered endangering the health of villagers. Since the detenu could not be prevented from indulging in these activities in spite of criminal prosecution lodged against him, he detained him under the provisions of the above mentioned act. The Government approved the order of the detention

by G.O.Rt.No.4037 dated 30.7.2006. The advisory board at its meeting held on 21.8.2006 had confirmed the order of detention. Thereafter, the Government in G.O.Rt.No.4484 dated 29.8.2006 detained him for a period of twelve months.

3) Aggrieved by the order of detention, this writ petition is filed alleging that the incidents mentioned in the detention order will not affect any maintenance of public order. In the first incident, the I.D.liquor was neither seized from him nor from his house. It was based on non-existence ground. The Advisory Board or the government has not considered his representations before confirming the order of detention nor a reply was given as to why his representation was not considered. The incidents mentioned in the order of detention were isolated and not proximate. It was made on frivolous grounds. Therefore, she prayed that the order of detention be declared as unconstitutional and arbitrary and release him forthwith.

4) The 1st respondent detaining authority filed counter asserting that he passed the order of detention after considering the various cases involved by the detenu. The order of detention dated 20.7.2006 was approved by the Government on 30.7.2006 confirmed by the Advisory Board in its meeting held on 21.8.2006. The Government finally confirmed the order of detention fixing the period of detention for 12-months from the date of passing the order of detention and issued G.O.Rt.No.4484, G.A.(L&O) Department dated 29.8.2006. The analyst after analyzing the material opined that the material was illicitly distilled liquor and injurious to health and unfit for human consumption. The incident referred to in the order of detention occurred in one excise year viz., while the first incident on 27.10.2005, the second incident occurred on 5.12.2005 and the third incident occurred on 22.3.2006 are proximate. Therefore, he prayed that the petition be dismissed.

5) The learned counsel for the petitioner mainly urged that there was unreasonable and unexplained delay on the part of the government in considering the representation of the detenu and therefore his continued detention is illegal.

6) The learned Government Pleader contended that this contention was not taken in the writ petition.

7) It is settled law, in a Writ of Habeas Corpus, court will not strictly abide by the pleadings made in the writ petition. The Supreme Court in **Icchu Devi vs. Union of India**[1] dealing on this point categorically observed:

> "It is also necessary to point out that in case of an application for a writ of habeas corpus, the practice evolved by this Court is not to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. Even a postcard written by a detenu from jail has been sufficient to activise this Court into examining the legality of detention. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. Whenever a petition for a writ of habeas corpus has come up before, this Court, it has almost invariably issued a rule calling upon the detaining authority to justify the detention. This Court has on many occasions pointed out that when a rule is issued, it is incumbent on the detaining authority to satisfy the court that the detention of the petitioner is legal and in conformity with the mandatory provisions of the law authorizing such detention: Vide *Niranjan Singh v. State of Madhya Pradesh AIR 1972 SC 2215; Sheikh Hanif v. State of West Bengal (1974) 2 SCR 258: (AIR 1974 SC 679) and Dulal Roy v. The District Magistrate, Burdwan (1975) 3 SCR 186: (AIR 1975 SC 1508)*. It has also been insisted by this Court that, in answer to this rule, the detaining authority must place all the relevant facts before the court which would show that the detention is in accordance with provisions of the Act. It would be no argument on the part of the detaining authority to say that a particular ground is not taken in the petition. Vide *Nazamuddin v. The State of West Bengal (1975) 2 SCR 593: (AIR 1974 SC 2353)*. Once the rule is issued it is the

> bounden duty of the Court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and the citizen is not deprived of his personal liberty otherwise than in accordance with law. Vide *Mohd. Alam v. State of West Bengal (1974) 3 SCR 379: (AIR 1974 SC 917) and Khudiram Das v. State of West Bengal (1975) 2 SCR 832: (AIR 1975 SC 550)*.
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> This practice marks a departure from that obtaining in England where observance of the strict rules of pleading is insisted upon even in case of an application for a writ of habeas corpus, but it has been adopted by this Court in view of the peculiar socio-economic conditions prevailing in the country…….The burden of showing that the detention is in accordance with the procedure established by law has always been placed by this Court on the detaining authority because Article 21 of the Constitution provides in clear and explicit terms that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law. This constitutional right of life and personal liberty is placed on such a high pedestal by this Court that it has always insisted that whenever there is any deprivation of life or personal liberty, the authority responsible for such deprivation must satisfy the court that it has acted in accordance with the law…….”

8) Before considering the question as to whether there was undue and unexplained delay in considering the representation of the detenu, it is important to note that the 1st respondent the detaining authority passed the detention order on 20.7.2006. The detenu was taken into custody on 21.7.2006. The order of detention was approved by the Government in G.O.Rt.No.4037 dated 30.7.2006. The Advisory Board in its meeting on 21.8.2006 approved the order of detention. Thereupon the Government confirmed the order of detention through G.O.Rt.No.4484 dated 29.8.2006 by fixing detention for a period of 12-months. Importantly, the representation to the Government made by the detenu on 23.8.2006 was not considered while passing order of detention on 29.8.2006. It was rejected on 22.9.2006 long after receipt of representation.

9) The learned counsel for the petitioner strenuously contended that the government did not consider the representation expeditiously. At any rate the enormous delay of one month was not even explained. Consequently, the order of detention violates Art.22(4) & (5) of the Constitution.

10) A perusal of the record shows that the representation of the detenu dated 23.8.2006 was received by the Department of General Administration on 25.8.2006. The file was circulated to the Principal Secretary on 28.8.2006 and again to the Deputy Secretary on 29.8.2006. Para-wise remarks were called from the 1st respondent detaining authority on 30.8.2006. On receipt of the same, it was sent to the Chief Secretary on 13.9.2006. It was again sent back to the Principal Secretary on 15.9.2006 which in turn sent back to the Deputy Secretary on 16.9.2006. Finally the representation was rejected on 22.9.2006. No reason whatsoever was given as to why the representation of the detenu though received on 25.8.2006, by which date the order of detention was not made, was not placed before the appropriate authority. In other words, by 29.8.2006 when the Government issued order in G.O.Rt.4484 fixing the detention of 12-months, the representation of the detenu was very much with them. Assuming without admitting that not knowing the representation dated 23.8.2006 was received on 25.8.2006, it could not have kept the representation pending till 22.9.206, a period of nearly one month. It could be said that long delay in the disposal of the representation would be a breach of the constitutional rights and would render the continued detention as improper, imperishable and illegal.

11) This question of delay has been dealt by a Constitutional Bench of the Supreme Court in **K.M.Abdulla Kunhi and B.L.Abdul Khader *vs.* Union of India and others**[2]**.** Since the question on hand is squarely covered by the said decision, we excerpt the relevant

passages:

> "There are two constitutional safeguards, namely, Clause (4) of Article 22, and Clause (5) of Article 22. The former requires that if a detenu is liable to be detained for a longer period than three months, his case shall be referred to the Advisory Board which must report before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. The function of the Board is purely advisory and its report will enable the government to detain the person beyond three months provided the detention is valid on its merits and does not otherwise offend the Constitution. Clause (5) of Article 22 provides that when any person is detained in pursuance of an order made under any law providing for preventive detention that authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.
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> The detenu has two rights under Clause (5) of Article 22 of the Constitution: (i) to be informed, as soon as may be, of the grounds on which the order of detention is based, that is, the grounds which led to the subjective satisfaction of the detaining authority, and (ii) to be afforded the earliest opportunity of making a representation against the order of detention.
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> It is now beyond the pale of controversy that the constitutional right to make representation under Clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the government to afford to the detenu an opportunity to make representation and to consider such representation is distinct from the government's obligation to refer the case of detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the government. It is implicit in Clauses (4) and (5) of Article 22 that the government while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The obligation of the government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the references. The government

considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient case for detention. The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the government. The right to have the representation considered by the government, is safeguarded by Clause (5) of Article 22 and it is independent of the consideration of the detenu's case and his representation by the Advisory Board under Clause (4) of Article 22 read with Section 8(c) of the Act.

The representation relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution. Clause (5) of Article 22 therefore, casts a legal obligation on the government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in Clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation would be dealt with. The requirement however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal. This has been emphasized and re-emphasised by a series of decisions of this Court.

In *Jayanarayan Sukul case* ((1970)1 SCC 219) A.N. Ray, J., as he then was, speaking for the Constitution Bench has laid down four principles which should govern the consideration of representation of detenus: (SCC p.24, para 20)

> "First, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as

possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State. Fourthly, the appropriate government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the government will not send the matter to the Advisory Board. If, however, the government will not release the detenu the government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the government may still exercise the power to release the detenu."

In *Frances Coralie Mullin v. W.C. Khambra* ((1980) 2 SCC 275) Chinnappa Reddy,J., while dealing with the time imperative for consideration of the representation has emphasised: (SCC pp.279-80, para 5)

"We, however, hasten to add that the time imperative can never be absolute or obsessive. The Court's observations are not to be so understood. There has to be leeway, depending on the necessities (we refrain from using the word 'circumstances') of the case. One may well imagine a case where a detenu does not make a representation before the Board makes its report making it impossible for the detaining authority either to consider it or to forward it to the Board in time or a case where a detenu makes a representation to the detaining authority so shortly before the Advisory Board takes up the reference that the detaining authority cannot consider the representation before then but may merely forward it to the Board without himself considering it. Several such situations may arise compelling departure from the time imperative. But no allowance can be made for lethargic indifference. No

allowance can be made for needless procrastination. But, allowance must surely be made for necessary consultation where legal intricacies and factual ramifications are involved. The burden of explaining the necessity for the slightest departure from the time imperative is on the detaining authority."

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The crucial question that remains for consideration is whether the government should consider and dispose of the representation before confirming the detention. This Court in **V.J.Jain case** ((1979) 4 SCC 401) (at SCC p.405) that it is a constitutional obligation under Clause (5) of Article 22 to consider the representation before confirming the order of detention. If it is not so considered, the confirmation becomes invalid and the subsequent consideration and rejection of the representation could not cure the invalidity of the order of confirmation. To reach this conclusion, the court has relied upon two earlier judgments of this Court: (i) *Khudiram Das v. State of W.B.*((1975) 2 SCC 81) and (ii) *Khairul Haque v. State of W.B.*(W.P.No.246 of 1969 dt. 10.9.1969 - unreported)."

12) The Supreme Court repeatedly held that unexplained long delay is illegal and the detenu must be set at liberty (vide **Solomon Castro vs. State of Kerala and others** [3] and **Rajammal vs. State of T.N. and another**[4]**).** A delay of 20 days was held to be unjustified in **Solomon Castro's cae** (2-supra) referred to above. Even five days delay in not considering the representation was held to be bad in **Rajammal's case** (3-supra) referred to above. A three weeks delay was held to be illegal in **Venmathi Selvam(Mrs.) vs. State of T.N. and another**[5]**.**

13) Coming to the facts, the representation of the detenu dated 23.8.2006 was neither placed before the government nor was considered while fixing the period by order of detention on 29.8.2006. The representation dated 23.8.2006 which was received by the government on 25.8.2006 was considered on 22.9.2006, a month

thereafter and it was rejected. This enormous delay was neither explained nor substantiated. When the delay is long and remained unexplained, it cannot but be held that it is a fatal. In spite of the well settled legal position, the State Government has failed to explain satisfactorily that it was dealt with the representation of the detenu as promptly as possible. Even in the matter of preventive detention, the government has dealt in a routine manner. Therefore, this indifference of the government, continuing the detention, must be held to be illegal.

14) We, therefore, allow this writ petition quash and set aside the impugned order of detention and direct the respondents that the detenu shall be released forthwith. No costs.

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Justice J. CHELAMESWAR

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Justice D. APPA RAO

_____January 2007.

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[1] AIR 1980 SC 1983.
[2] (1991) 1 Supreme Court Cases 476
[3] (2000) 9 Supreme Court Cases 561
[4] (1999) 1 Supreme Court Cases 417
[5] (1998) 5 Supreme Court Cases 510